In my view, the agreement executed by the parties has all the badges of a complete assignment of the rights in the licence to the plaintiff. It allows the plaintiff to work and extract timber logs in the whole of the area; the plaintiffs agrees to pay the deposit and all other dues which are required by Government; the plaintiff agrees to construct roads and provide transport and to pay labourers' salaries and their workmen's compensation contributions. The defendant is the licence-holder to make arrangements with Government concerning the area, and the plaintiff agrees to compensate him for all expenses incurred thereby. The most important clause in the agreement provides for the payment of $2,000 as a lump sum or total payment in consideration for the logs extracted and sold by the plaintiff. The calculation of tons is not agreed upon, and lastly the arrangement of sale of timber logs belongs to the plaintiff. In short, the licence-holder, namely the defendant, merely sits still and gets a lump sum payment of $2,000 while the plaintiff works the area and fulfils all the obligations that are required under the Forest Enactment. To my mind, it possesses the notorious badge of the "*Ali Baba*" form of contract.

In my judgment the agreement is null and void and illegal as tending to contravene the provisions of rules 2 and 18 of the Forest Rules, 1935 which, as in the case of the Rubber Supervision Enactment, 1937, are intended to ensure the continuance of an industry on which the prosperity of this country is to some extent dependent.

Mr. Devadason then argued that although the agreement between the parties was illegal, nevertheless it had been executed and carried out and on that account it was effective to pass the property in the licence to the plaintiff. (See *Sarjan Singh* v. *Sardara Ali* [2]). And on the authority of *Palaniappa Chettiar* v. *Arunasalam Chettiar* [3] it was also said that the defendant was precluded from setting up the defence of illegality. In my view the two cases can be distinguished. In the former the plaintiff founded his claim on his right of property in the lorry and his possession of it. He did not have to found his claim by setting up the illegal or immoral act. In the latter case the father had to base his claim on his own fraud which was fully achieved and that the court would not lend its aid to such a man. In the present case the defendant is not the party who seeks to enforce the illegal contract. If he were the plaintiff he would be in the same position as in the *Chettiars'* case. He comes to court as a defendant, and my understanding of the law is that it is within the province of a defendant to set up the defence of illegality. If the law is otherwise, the result would be calamitous. It would mean that the court, contrary to precedents, will lend its aid to enforce an illegal act.

The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *D. A. Devadason; Kam Woon Wah & Co.*

HO WEE CHEONG v. HO POI YUEN

[O.C.J. (Raja Azlan Shah J.) May 10, 1967]

[Raub — Civil Suit No. 17 of 1966]

Landlord and Tenant — Notice to quit — Business premises — Whether sleeping on premises at night makes premises a dwelling-house — Whether acceptance of rent waives notice — Control of Rent Ordinance, 1956.

Landlord and Tenant — Rent — Standard rent — Rent paid in excess — Premises de-controlled — Control of Rent Ordinance, 1956, s. 6.

The plaintiff landlord claimed possession of premises let to his tenant, the defendant. The tenancy was in respect of 3/4 of the front portion of the ground floor of premises known as No. 21 Bibby Road, Raub, for a period of 8 years ending on April 30, 1966 at a rental of $140 per month. The terms of agreement *inter alia* included (i) that the defendant shall be at liberty . . . to carry out any type of business he desires, and (ii) that the defendant binds himself to deliver vacant possession at the expiration of the tenancy on being served with 3 months notice to quit by the lessor. The plaintiff on January 4, 1966 caused a notice to quit to be served on the defendant but the latter failed to deliver vacant possession on the expiry of the said notice. Rents had been tendered and accepted by the plaintiff after the expiry of the tenancy but without prejudice to this pending litigation. The premises were de-controlled on July 1, 1962, and at the date when the proceedings began *i.e.* May 9, 1966, the provisions of the Control of Rent Ordinance, 1956, only applied to domestic premises as far as the State of Pahang was concerned (see Pahang P.U. 13/1966).

Held: (1) the question whether a premises or part of it was let as a "domestic premises" within the meaning of the Ordinance is to be decided by looking at the terms of the agreement. In this case at the time of the letting the contemplated user was that of a business premises; the control of Rent Ordinance did not apply to such premises;

(2) the notice to quit had not been waived and the tenancy had been determined with effect from April 30, 1966.

Cases referred to:—

(1) *Hardial Singh* v. *Malayan Theatres Ltd.* [1955] M.L.J. 180.

(2) *Tovey* v. *Tyach* [1955] 1 Q.B. 57.

(3) *Wolfe* v. *Hogan* [1949] 2 K.B. 194.

(4) *Court* v. *Robinson* [1951] 2 K.B. 60 at p. 73.

(5) *Greig* v. *Francis & Campion* (1922), 38 T.L.T. 519.

(6) *Barrett* v. *Hardy Brothers (Alnwick) Ltd.* [1925] 2 K.B. 220, 227.

(7) *MacMillan Co. Ltd.* v. *Rees* [1946] 1 All E.R. 675.

(8) *Hong Cheok Lam* v. *Ong Sim Mai* [1951] M.L.J. 34.

(9) *Clark* v. *Grant* [1950] 1 K.B. 104, 105.

(10) *Doe* v. *Batten* (1775), 1 Cop. 243, 245.

(11) *Wagner* v. *Tan Eng Yeow* [1947] M.L.J. 23.

CIVIL APPEAL.

Alexander Y. L. Lee for the plaintiff.

B. C. Lee for the defendant.

Cur. Adv. Vult.

Raja Azlan Shah J.: The plaintiff claims possession of premises known as No. 21, Bibby Road, Raub, in respect of which he is the registered proprietor and the defendant is the tenant.

The defendant is the sole proprietor of a business in textiles and cosmetics at premises No. 19, Bibby Road, Raub, since 1947. He lives with his wife, daughter, and father on the upper floor, and on the ground floor he runs his business with the aid of eight employees, seven of whom sleep on the premises. At premises No. 23, Bibby Road, his younger brother runs the same sort of business. The defendant's business expanded and he thereby prospered, and on 17th May 1958 he rented the next-door premises (the subject matter of the action) from the plaintiff's eldest sister who was then the administratrix of the estate of the plaintiff's father. The tenancy was in respect of three-fourths of the front portion of the ground floor (hereinafter referred to as the said portion) for a period of eight years ending on 30th April 1966 at a rental of $140 per month payable in arrears. The terms of the agreement are, *inter alia*, (a) that the defendant shall be entitled to make use of the rear portion jointly with the lessor, (b) that the defendant shall be at liberty during the term of the agreement to carry out any type of business he so desires, (c) that the defendant binds himself to deliver vacant possession at the expiration of tenancy on being served with three months notice to quit by the lessor, and (d) that the agreement is binding upon the heirs, successors or administrators of both parties. I have visited the said premises and notice that it is the usual type of shop-house found everywhere in this country — a front ground-floor portion and an air-well in the middle leading to the kitchen portion in the rear and an upper floor ordinarily used for human habitation. The remaining quarter portion of the front ground-floor is rented to a tailor. Before the defendant became the tenant the said portion was rented to one Ho Chen Fan for his business for some five months at a monthly rental of $95 plus $15 in respect of hiring of furniture. The defendant runs the business at the said portion of No. 21, Bibby Road, with the assistance of three employees who by their terms of service with the defendant are required to sleep on the premises in order to look after the goods. The plaintiff became the registered proprietor on 8th December 1961 and thereby became the defendant's landlord. On 4th January 1966 he caused a notice to quit to be served on the defendant who received it on 8th January 1966. On 10th January 1966 the defendant transferred his sole proprietorship in the business at No. 19, Bibby Road, into his wife's name. The defendant failed to deliver vacant possession on the expiry of the said notice and still remains in possession. Rents have been tendered and accepted by the plaintiff after the expiry of the tenancy but without prejudice to the plaintiff's pending litigation.

The plaintiff accordingly claims vacant possession, double rent, and other consequential reliefs.

The substantial question which arises for decision in the present case is whether the said portion had been let as business premises; if so let as such premises, it is clearly not amenable to the Control of Rent Ordinance, 1956. In so stating what appears to me to be the substantial question in issue, I do not forget the arguments which were addressed to me on behalf of both parties with regard to the questions of "suitable alternative accommodation", "reasonableness' and "hardship" under the said Ordinance. Upon the view which I take of this case, it is not necessary to decide whether or not the arguments are well-founded.

The Control of Rent Ordinance, 1956, *prima facie*, unlike its English counterpart which gives protection in respect of dwelling houses only, extends its protection to all premises whether used for business or as dwelling houses (see *Hardial Singh* v. *Malayan Theatres Ltd.*[1]). However, section 1(3) and (4) of the Ordinance empower the Ruler-in-Council to extend the provisions of the Ordinance from year to year as well as to limit its application to a particular type of premises. In the State of Pahang the provisions of the Ordinance have since 1st July 1962 been limited to affect domestic premises only (see Pahang L.N. 42/1962). No doubt at the inception of the tenancy the provisions of the Ordinance applied to domestic as well as to business premises, but at the date when proceedings began, that is, on 9th May 1966, the provisions of the Ordinance only affect domestic premises (see Pahang P.U. 13/1966). It is indeed a general conception that the applicability of the Ordinance is to be tested at a time when the proceedings began (see *Tovey* v. *Tyach* [2]). Such being the case, the protection which the Ordinance extends is not dissimilar to the English counterpart.

The question whether a premises or part of it is let as a domestic premises within the meaning of the Ordinance is to be decided by looking at the terms of the agreement. "Where the terms of the tenancy provide for or contemplate the user of the premises for some particular purpose, that purpose will *prima facie*

be the essential factor. Thus, if the premises are let for business purposes, the tenant cannot claim that they have been converted into a dwelling-house merely because someone lives on the premises. If, however, the tenancy agreement contemplates no specified user, then the actual user of the premises at the time when possession is sought by the landlord, must be considered." (See *Wolfe* v. *Hogan* [3]). In this connection it would be pertinent to quote the following passage from the judgment of Denning L.J. (as he then was) in that case:—

"In determining whether a house or part of a house is 'let as a dwelling' within the meaning of the Rent Restriction Acts, it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further. But, if there is no express provision, it is open to the court to look at the circumstances of the letting. If the house is constructed for use as a dwelling-house, it is reasonable to infer the purpose was to let it as a dwelling. But if, on the other hand, it is constructed for the purpose of being used as a lock-up shop, the reasonable inference is that it was let for business purposes. If the position were neutral, then it would be proper to look at the actual user. It is a question of implied terms. It is a question of the purpose for which the premises were let".

That principle was reiterated by the learned Lord Justice in *Court* v. *Robinson.*[4] It is purely a question of fact what is the real, main and substantial purpose of the premises (see *Greig* v. *Francis & Campion* [5]).

From the terms of the agreement, as I have appreciated it, it seems to me plain that at the time of the letting the contemplated user was that of a business premises. That is evident from a term of the agreement which provides that the defendant is at liberty to carry out any type of business on the portion let. Other circumstances pointing towards that direction are as follows: Firstly, the defendant carries on his family business at premises No. 19, Bibby Road, but as his business prospered he rented the said portion with the intention of extending his business there. The fact that his three employees lived on the said premises is no indication that the user is that of a domestic premises. "That important matter is the rights under the lease, not the *de facto* user" (see *Barrett* v. *Hardy Bros. (Alnwick) Ltd.*[6]). Thus, sleeping on premises at night or having meals in them does not *ipso facto* have the effect in law of making these premises a dwelling-house (see *MacMillan Co. Ltd.* v. *Rees* [7]). Thirdly, there is evidence that the said portion was previously let as a business premises. Fourthly, as the said portion is constructed and passed by the Town Council for the purpose of being used as a business premises, the reasonable inference is that it was let for business purposes.

Then comes the other question that the notice to quit was waived by the plaintiff by the acceptance of rent during its currency, that is, before the expiration of the said notice. The defendant's case therefore is that acceptance of rents tendered after the notice and up to but not beyond the expiration of the said notice operates as a recognition of the relationship of landlord and tenant.

The law regarding waiver is well established. Acceptance of rent after knowledge of breach of covenant which entitles the landlord to claim a forfeiture waives the forfeiture: *Hong Cheok Lam* v. *Ong Sim Mai*;[8] see also the observation of Lord Goddard C.J. in *Clark* v. *Grant.*[9] Also, acceptance of rent in cases of holding over depends on *quo animo* the rent was received and what the real intention of both the parties was: per Lord Mansfield in *Doe* v. *Batten;*[10] followed in *Clark* v. *Grant, supra.* It has also been held that acceptance of rent up to but not beyond the expiration of notice to quit does not constitute waiver: *Wagner* v. *Tan Eng Yeow.*[11]

Applying the foregoing principle laid down in *Wagner's* case, it seems plain that the notice to quit had not been waived and that the tenancy had been determined with effect from 30th April 1966.

It is now necessary to deal with the counter-claim. At the commencement of the proceedings the defendant abandoned the claim in respect of the premium of $1,000. This leaves only the question of excessive rent to be determined. It would appear that the premises were first let to one Ho Chen Fan for $95 rental and $15 for hire of furniture, making a total of $110. This is *prima facie* the standard rent, that is, the rent to which the premises were first let after 25th September 1940. The meaning of "maximum recoverable rent" is clearly defined in section 6 of the Control Ordinance, 1956. The particulars in the counter-claim, however, aver that the maximum recoverable rent is $120. Counsel for the defendent failed to show, and indeed I am unable to understand, how that figure is arrived at. Although the plaintiff alleged that he paid for water and electricity rates, I gather, and I am satisfied from his admission in cross-examination coupled with clause 5 of the tenancy agreement (Exh. P.16), that that is not so. There is evidence to show that the defendant had more space in the premises than the former tenant in that he was allowed the extra use of the air-well and the rear portion of the premises. Unfortunately, no specific dimensions of the extra area were given and it would be impossible for me to decide what increase in rent, if any, is permissible. In view of the unsatisfactory state of affairs I am left to ascertain on my own what the maximum recoverable rent is by invoking the provisions of section 6 of the Ordinance. Sub-section (1) (b) (iii) enacts:—

"(1) Subject to the provisions of sub-section (3) of this section, the maximum recoverable rent of any premises shall be —

(b) where there has been no order of the Board fixing the rent of the premises, the standard rent increased to the extent following, that is to say:

(iii) in any case, to the extent set out in the third column of the First Schedule to this Ordinance in respect of the types of premises and the standard rents set out adjacent thereto in the first and second columns of the said Schedule."

The relevant part of the said Schedule is as follows:—

Type of premises.	*Standard rent.*	*%.*
Premises used wholly or partly for purposes other than human habitation.	Up to and including $150 per month.	25%.

I am satisfied that the standard rent is $110 and therefore the permissible increase would be 25% of $110 which amounts to $27.50. The maximum recoverable rent according to my calculation would be $137.50. Any sum above this figure would be deemed to be excessive. It is common ground that the defendant was paying $140 per month since the commencement of the tenancy, that is, from 1st May 1958 until its expiration on 30th April 1966. The premises, however, became de-controlled from 1st July 1962. It is clear as from that date the premises were not subject to the said Ordinance. It is therefore evident that the defendant had been paying an excess rent of $2.50 per month thus amounting to $125 for 50 months. He therefore succeeds on the counter-claim to the extent of $125 with costs on the lower court scale.

There will be judgment for the plaintiff as prayed on the claim and costs. The defendant is to deliver vacant possession of the said premises forthwith.

Order accordingly.

Solicitors: *Skrine & Co.; Shook Lin & Bok.*

THONG SEONG POH & ANOR. v. THONG MENG TEE

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) May 16, 1967]

[K.L. — Federal Court Civil Appeal No. X. 56 of 1966]

Landlord and Tenant — Statutory tenant — Assignment of tenancy — Order for recovery of possession by landlord — Control of Rent Ordinance, 1956 — Abuse of Ordinance.

This was an appeal from the judgment of Ismail Khan J. ([1967] 1 M.L.J. 23) upholding the decision of the learned president granting the respondent an order for the recovery of possession of premises to which the Control of Rent Ordinance applied.

Held: all the cogent facts and other significant circumstances were taken into account by the learned president and the trial judge and the appeal had no more merits in law than on the facts and should be dismissed with costs.

Per **Ong Hock Thye F.J.:** "For myself, I have no doubt that the first appellant was the principal and the second defendant his assistant in a piece of sharp practice designed to deny the landlord possession of his own property. That they have succeeded for twenty years is one of the unfortunate effects of rent control. The Ordinance was scandalously abused in this case."

Case referred to:—

(1) *R.* v. *Cook* [1959] 2 W.L.R. 616, 622.

FEDERAL COURT.

Dato' S. P. Seenivasagam for the appellants.

Atma Singh Gill for the respondent.

Cur. Adv. Vult.

Ong Hock Thye F.J.: The appellants, father and son, were defendants in an action in the Sessions Court at Kuala Pilah, which resulted in the plaintiff, the present respondent, obtaining an order for the recovery of premises to which the Control of Rent Ordinance, 1956 applied. They failed in their appeal to the High Court at Seremban and now appeal to this court. For convenience I shall refer to them hereinafter as plaintiff and defendants.

The parties were and are hardware dealers. In 1947 the plaintiff purchased the premises in question, a shop-house No. 45 Main Road, Bahau. The first defendant was then a sitting tenant occupying, with his family, half of the premises and carrying on business under the style of Chip Thye. In 1950 the first defendant applied to the Rent Assessment Board for revision of rent. On July 2, 1951 the plaintiff sent him a notice to quit, which was duly served. In the result the first defendant thereafter became a statutory tenant, by virtue of section 20(a) of the Ordinance. On October 9, 1959 he registered with the Registrar of Businesses a transfer of the business to his son, the second defendant, in contemplation of his own demise and in order to save estate duty. On October 1, 1962 ownership of the business was transferred back to the first defendant.

Meanwhile, in August 1961, another shop-house, No. 40 Main Road, Bahau, a few doors away from No. 45, was purchased in the names of the first defendant's wife and daughter. On November 15, 1961 a notice in a Chinese-language newspaper, *Sin Chew Jit Poh* advised the public of the impending purchase by "Chip Thye" of the premises No. 40, Main Road. Although the first defendant disclaimed any knowledge of this advertisement, both the president of the sessions court, at first instance, and Ismail Khan J., on appeal, were equally satisfied to the contrary. I may as well say it now, instead of later, that I fully agree with their concurrent findings of fact on this point.

The line of business started in the newly acquired premises, No. 40, was the same as that carried on in No. 45. The registered proprietors purported to be the second defendant and his sister, a seamstress in Singapore. The entire family moved into residence in No. 40, but the first defendant himself retained a *pied-á-terre*